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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 370

MARGUERITE JAMIESON, ET AL., *Petitioners,*

v.

WOODWARD & LOTHROP, ET AL., *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT HELENA RUBENSTEIN, INC. IN OPPOSITION

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OPINION BELOW

There was no written opinion in the District Court. The opinion of the Circuit Court of Appeals is not yet reported, but is set forth correctly in the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

The Petitioners state that there are two questions presented in their application. It is respondent's position that there is but one; i.e., whether error was committed by the United States Court of Appeals for the District of Columbia Circuit in sustaining the ruling of the District Court's granting of respondent's Motion for Summary Judgment.

STATEMENT

Petitioner Marguerite Jamieson purchased from Woodward & Lothrop, a Washington, D. C., department store, an elastic exercising device called "Lithe-Line" manufactured by respondent Helena Rubenstein, Inc. The "Lithe-Line" consisted of a length of ordinary rubber, approximately the thickness of an ordinary lead pencil, about forty inches long, with loops at each end, which served as handles.

On February 11, 1955, petitioner began a normal and natural exercise using the "Lithe-Line". Lying down on her back on the floor, holding the handles of the exerciser in her hands, placing the central portion of the exerciser on the soles of her feet, and with knees stiff, raised her feet up straight. She intended to lower and raise her feet alternately, thus exercising her body muscles. While so using the exerciser, she lost consciousness. When she regained consciousness, she was lying on the floor. She testified she did not know what had occurred. The Court of Appeals held in its opinion that it was a reasonable inference that the exerciser

had slipped from the soles of her feet and had struck her on her eye.

An action for damages was commenced by petitioners against Woodward & Lothrop for breach of warranty; and Helena Rubenstein, Inc., for negligence. These parties answered. Petitioner Marguerite Jamieson's deposition was taken during the course of which the "Lithe-Line" and the accompanying printed instructions were introduced as exhibits. Interrogatories submitted by respondent were answered by petitioners. Respondent's Motion for Summary Judgment was granted on the basis of the complaint, the answers, the deposition, and the exhibits. Petitioner testified in her deposition that the exerciser did not break, and that upon subsequent examination by her it appeared to be in the same condition as before her accident. The exerciser itself was used as an original exhibit in the District Court proceedings and subsequently in the arguments before the Court of Appeals. It had no imperfections or defects whatsoever.

On appeal, the Court of Appeals affirmed the decision of the District Court in its granting of summary judgment in favor of Woodward & Lothrop on petitioners' allegation of breach of warranty in the sale of the exerciser by this defendant below to petitioner Marguerite Jamieson. Petitioners concede the correctness of this affirmance as they do not seek review by this Court as to this portion of the Court of Appeals' Decision, but, confine their Petition for Review as to that Court's r. ing as regards the liability of Respondent Helena Rubenstein, Inc.

As to the liability of Respondent Helena Rubenstein, Inc., the Court of Appeals held:

> "The unfortunate event was an accident, we think, —an event so natural that responsibility for it is by common consent not ascribed to fault. Of course, one is truly sorry for the unfortunate victim of a chance accident, but the premise of pecuniary liability for tort is not the fact of injury, but is negligence."

While recognizing that the Virginia law applies to this aspect of the case, the Court of Appeals exhaustively reviewed similar decisions from all jurisdictions, treatises, and law review articles, as well as the decisions of the Virginia Courts. Its conclusion was that under the governing principles of Virginia tort law as determined by the Supreme Court of Appeals of Virginia in the cases of *McClanahan* v. *California Spray-Chemical Corp.*, 194 Va. 842, 75 S.E. 2nd 712 and *Olds* v. *Wood*, 196 Va. 960, 86 S.E. 2nd 32, that the District Court was correct in granting summary judgment in favor of this respondent; that respondent was under no duty to warn of the obvious danger of a mishap in the ordinary use of an uncomplicated and non-defective article.

It was, moreover, held by the Court of Appeals that Petitioners' references, at the time of argument of respondent's motion for summary judgment in the District Court, as to the possibilities of providing safeguards for use with the "Lithe-Line" did not constitute a fact or an issue of fact, so as to defeat respondent's motion for summary judgment.

As the Court pointed out:

> "Plaintiff tendered no issue of fact on this topic; a motion for summary judgment had been made, and she was opposing it; she should have posed a genuine issue of material fact as to the reasonable-

ness and feasibility of a safeguard if she wished to make that contention. It was not necessary that her evidence be proffered, but faced with a motion for summary judgment she had to raise an issue of fact."

ARGUMENT

No sound reason is offered by petitioners for the granting of a Writ of Certiorari. Reliance is not placed upon any ground enumerated in Rule 19(b) of this Court.

The questions decided by the Court of Appeals involve the interpretation by that Court of the Virginia substantive law of torts, and the interpretation of the duties and requirements of a litigant when faced with a motion for summary judgment. By reason of the unique geographical location of the District of Columbia, its Courts are confronted many times each year with questions that involve the interpretation of the substantive law of the neighboring states of Maryland and Virginia. There is nothing novel, startling, or unusual in this situation. The Court of Appeals carefully observed the well established rules of appellate review and did not depart from, nor sanction a departure from, the accepted and usual course of judicial proceedings. It exhaustively reviewed all of the authorities and law applicable to the involved accident, and correctly concluded that under the controlling Virginia decisions the ruling of the District Court was correct. The decision of the Court of Appeals is not in conflict with the decisions of this Court, nor any of the other several circuits.

All of the arguments now presented by petitioners were urged upon the lower Court in the briefs and arguments before that Court. There has been advanced

no valid reason why a Writ of Certiorari should issue in this case.

As Chief Justice Taft of this Court stated:

> "The jurisdiction to bring up cases by certiorari from the circuit courts of appeal was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by the court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing." *Magnum Import Co.* v. *Coty*, 262 U.S. 159, 163.

Petitioners' arguments seem to be mainly directed to the proposition that the Court of Appeals incorrectly interpreted Virginia substantive law as proclaimed in the *McClanahan* and *Olds* cases (citations supra) and that it superimposed or substituted its own interpretation of the law for that of Virginia's. These same arguments also urge, however, that the involved question has never been passed upon by the Virginia Courts. The fallacy of this argument is sharply emphasized by the many decisions of the various Circuit Courts of Appeal all holding that if a Federal Court, in seeking to determine what the state law is upon the subject in question, finds no cases precisely in point which would support the contention of the party taking the appeal from the decision of the lower Federal Court, then, the decision of such lower Federal Court will be affirmed. An excellent example of this type of decision is found in *New York Life Insurance Co.* v. *Jackson*, 98 F. (2d) 950 (Cert. den. 305 U.S. 640). In this case, the Circuit Court of Appeals in its first opinion had affirmed

the action of the District Court (94 F. (2d) 288). Upon petition to this Court, Certiorari was granted, (304 U.S. 261) and the case was remanded to the Circuit Court of Appeals for further proceedings inasmuch as the prior opinion of the Circuit Court had been based on the principles of general law, rather than on the state law of Missouri which was applicable to this question. Upon remand, the same conclusions as previously reached by the Circuit Court of Appeals were reaffirmed. In its second opinion that Court held that after exhaustive review of the Missouri authorities, the precise question presented had never been decided by the courts of Missouri, and, accordingly, the Circuit Court of Appeals was bound by its independent judgment on the issues presented by Missouri law. The conclusion, then, as to this aspect of petitioners argument, is inescapable. If, as Petitioners argue, there is no decision by the Virginia courts upon the precise points as presented by this case, Petitioners are bound by this decision of the Court of Appeals.

The opinion of the Court of Appeals is complete and convincing. The Petition is lengthy and exhaustive. The case itself, however, is a simple one. Petitioner Marguerite Jamieson, while exercising with an uncomplicated, non-defective, rubber exerciser was injured when apparently the exerciser slipped from her feet and struck her eye. The issue was whether or not under Virginia law, Respondent manufacturer of the exerciser was negligent. The Circuit Court of Appeals affirmed the decision of the District Court in answering this question in the negative.

Moreover, the decision and opinion below are predicated on the assumption that the injuries and damages of which Petitioners complain were caused by the slip-

ping of the exerciser from the feet of the female Petitioner. The record in this case, however, is silent as to how the injuries actually were occasioned. Petitioner Marguerite Jamieson was the only person present at the time of the accident. She could recall nothing as to how the accident occurred. When she regained consciousness, the exerciser was still in its original non-defective condition. Clearly, from Petitioner's own recital of the facts, there is no way by which fault for the happening of the accident can be ascribed to Respondent. Petitioner's sole use and control of the exerciser at the time of the accident point simply to pure misadventure, or, perhaps, lack of due care on the part of Petitioner herself for her own safety.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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